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PP v. SAYED SHAHRIMAN WAN AHMAD HUSSEIN

COURT OF APPEAL, PUTRAJAYA
AZIZAH NAWAWI JCA
MOHAMED ZAINI MAZLAN JCA
ALWI ABD WAHAB J
B [CRIMINAL APPEAL NO: Q-09(H)-156-07-2023]
23 SEPTEMBER 2024

Abstract – *Although it has been a practice for prosecutors to spell out the punishment/sentence for the offence in a charge, in reality, the details of a sentence is not part of the charge and does not form part of the legal requirements that makes a charge valid. The trial court is bound by the relevant sentencing provisions, and cannot place reliance solely on the sentence prescribed in a charge.*

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CRIMINAL PROCEDURE: *Charge – Sentence – Accused charged at Sessions Court for possession of drugs – Offence under s. 6 and punishable under s. 39A(2) of Dangerous Drugs Act 1952 – Accused pleaded guilty and sentenced to seven years' imprisonment and four strokes of whipping – Sessions Court relied on sentencing provision set out in amended charge on whipping – Whipping of four strokes contrary to sentence statutorily provided under s. 39A(2) which was ten strokes of whipping – Sentence meted out by Sessions Court maintained by High Court – Whether sentence concerning offence required to be stated in charge – Whether charge defective if particulars of sentence erroneous or not set out – Whether trial court bound by sentencing provision – Whether reliance could be placed on sentence set out in charge – Criminal Procedure Code, ss. 152, 153 & 154*

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CRIMINAL LAW: *Offence – Dangerous drugs – Possession – Accused charged at Sessions Court for possession of drugs – Offence under s. 6 and punishable under s. 39A(2) of Dangerous Drugs Act 1952 – Accused pleaded guilty and sentenced to seven years' imprisonment and four strokes of whipping – Sessions Court relied on sentencing provision set out in amended charge on whipping – Whipping of four strokes contrary to sentence statutorily provided under s. 39A(2) which was ten strokes of whipping – Whether Sessions Court erred in meting out sentence – Whether conviction and sentence safe – Whether ought to be set aside*

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The respondent was charged at the Sessions Court for drug possession, an offence under s. 6 of the Dangerous Drugs Act 1952 ('Act'), punishable under s. 39A(2) of the same Act. The respondent, who was unrepresented, pleaded guilty and was sentenced to seven years' imprisonment and four strokes of whipping. In passing the sentence, the Sessions Court had relied on the sentencing provision set out in the amended charge on the whipping. The imposition of the four strokes of whipping, however, was contrary to the minimum ten strokes set out under s. 39A(2) of the Act. The prosecution did not object when the Sessions Court passed the sentence. Upon realising this

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discrepancy, the prison authorities sought a revision of the sentence while the prosecution filed an appeal. Both the appeal and the revision were heard simultaneously by the High Court. Despite acknowledging that the Sessions Court should have imposed not less than ten strokes of whipping, the High Court refused to revise the sentence and proceeded to dismiss the appeal. The High Court held that: (i) the fairest outcome was to maintain the sentence meted out by the Sessions Court as the respondent had pleaded guilty to the amended charge; (ii) the prosecution did not protest after the Sessions Court had passed the sentence; and (iii) although the correct sentence had been explained to the respondent by the Sessions Court before sentencing, it was only done after the critical process, namely, where the respondent had pleaded guilty after the alleged erroneous amended charge was read to him. Hence, the present appeal by the prosecution. In support of the appeal, the prosecution averred that: (i) the High Court erred in law by affirming the Sessions Court's sentence of four strokes of whipping, contrary to the provision of s. 39A(2) of the Act, which imposes not less than ten strokes of whipping. The word 'shall' preceding 'whipping of not less than ten strokes', makes it a mandatory provision; and (ii) the respondent was not prejudiced as he understood the nature and consequence of his guilty plea when the mandated sentence liable to be imposed on him was read and explained at the Sessions Court.

Held (setting aside conviction and sentence; remitting case back to Sessions Court for retrial)
Per Mohamed Zaini Mazlan JCA delivering the judgment of the court:

(1) The provision on charges is contained in Chapter XVIII of the Criminal Procedure Code ('CPC'), from ss. 152 to 172. The form of a charge is prescribed under s. 152. Section 153(1) requires a charge to contain the particulars of the time and place of the alleged offence and the person against whom the offence was allegedly committed as reasonably sufficient to give the accused notice of the matter that he is charged with. Under s. 154, the charge should contain particulars of how the alleged offence was committed if the particulars mentioned under ss. 152 and 153 do not give the accused sufficient notice of the matter he is charged with. The format of a charge is provided in Form 27 in the CPC. Prosecutors have made it a practice to set out the sentence applicable to the offence in the charge form, possibly for convenience. In this case, as in many cases, the prosecution had set out the punishment for the offence in the charge form. The sentence on the whipping was wrong as not less than ten strokes of whipping are to be prescribed, whether the accused was eventually convicted or chose to plead guilty. There is no requirement for the sentence concerning the offence to be stated in the charge, under the CPC, nor is it set in Form 27 in the CPC. It is optional for the sentence to be stated in the charge form, for it does not form part

of the charge; it is simply not required. A charge could not be deemed defective if the particulars of the sentence were not set out or, if set out, is erroneous. (paras 15-18)

(2) The Sessions Court erred when it imposed only four strokes of whipping when, at least, ten strokes were to be imposed under s. 39A(2) of the Act. The Sessions Court was bound by the sentencing provision in the Act and not merely rely on the sentence set out in the amended charge. The fault equally laid with the prosecutor, who should have been more vigilant. The High Court erred in law when it chose to uphold the sentence of four strokes of whipping, meted out by the Sessions Court. Since the High Court opined that the respondent had pleaded guilty to the alleged defective amended charge, he should be given the benefit of the doubt; more so when he was not represented at the Sessions Court. The High Court should have allowed the appeal and remitted the case to the Sessions Court for the respondent's plea to be retaken. This directive would have been the fairest outcome. (paras 19, 21 & 22)

Legislation referred to:

Criminal Procedure Code, ss. 152(4), 153(1), 154, 155, 156, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 171A, 172, 173(b), Second Schedule Form 27

Dangerous Drugs Act 1952, ss. 6, 39A(2)

For the appellant - Atiqah Abdul Karim; AG's Chambers
For the respondent - Simon Siah; M/s Simon Siah, Chua and Chow Advocs

[Editor's note: Appeal from High Court, Kuching please see PP v. Sayed Shahriman Wan Ahmad [2023] CLJU 1933; [2023] 1 LNS 1933 (overruled).]

Reported by Najib Tamby

JUDGMENT

Mohamed Zaini Mazlan JCA:

Introduction

[1] The respondent had pleaded guilty to a drug possession charge in the Sessions Court. He was sentenced to seven years of imprisonment and four strokes of whipping. The error lies in the number of strokes for whipping, as the minimum number of strokes for the offence was ten strokes. The Sessions Court had relied on the sentencing provision stated in the amended charge, as the prosecution had erroneously stated "less than ten strokes" instead of "not less than ten strokes". The prosecutors only realised the error later and appealed to the High Court. The High Court, however, dismissed the appeal and maintained the four strokes of whipping imposed on the basis that the respondent had pleaded guilty to the amended charge, even if the sentencing provision stated in the amended charge was erroneous.

[2] The pertinent issue is whether the sentencing provision must be stated in a charge and consequently forms part of the charge. The other arising issue is whether the court is constrained to pass the sentencing provision expressed in a charge even where it is erroneous.

Brief Facts

[3] The respondent was charged at the Sessions Court for an offence under s. 6 of the Dangerous Drugs Act 1952 ("DDA 1952"), punishable under s. 39A(2) of the same Act. The amended charge read as follows:

> Amended Charge
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> That you, on 17.9.2022, at about 0945 hrs, at a house addressed No. 142 Lorong 7A Taman Malihah Jalan Matang, in the District of Padawan, in the state of Sarawak, did have in your possession, *to wit*, 89.77 grams of cannabis, and thereby you have committed an offence under s. 6 of the Dangerous Drugs Act 1952 and punishable under s. 39A(2) of the Act.
>
> Sentence
>
> Life imprisonment or not less than 5 years and less than 10 strokes of whipping

[4] The respondent was unrepresented. He chose to plead guilty. The Sessions Court sentenced him to seven years imprisonment and four strokes of whipping from the date of conviction. The prosecution did not object when the Sessions Court passed the sentence.

[5] The issue is with the sentence on the number of strokes of whipping, as s. 39A(2) of the DDA 1952 prescribes whipping of not less than ten strokes. The section reads as follows:

> **Increased penalty where the subject matter is the prescribed amount of certain dangerous drugs**
>
> 39A. (1) ...
>
> (2) Every person found guilty of an offence against this Act where the offence is not punishable with death and where the subject matter of the offence is:
>
> (f) 50 grammes or more in weight of cannabis;
>
> ...
>
> shall, instead of being liable to the punishment provided for that offence under the section under which the person has been so found guilty, be punished with imprisonment for life or for a term which shall not be less than five years, and he shall also be punished with **whipping of not less than ten strokes**.
>
> (emphasis added)

[6] The Sessions Court had only imposed four strokes of whipping contrary to the minimum ten strokes set out under s. 39A(2) of the DDA 1952. The Sessions Court had relied on the sentencing provision set out in the amended charge on the whipping. The prison authorities and the prosecution later realised this discrepancy. The former sought a revision of the sentence through a letter dated 1 December 2022 to the High Court. The prosecution filed an appeal on 25 November 2022. Both revision and appeal were heard simultaneously by the High Court.

The Appeal At The High Court

[7] The prosecution acknowledged the error under the heading of "sentence" in the amended charge sheet, where it had inadvertently left out the word "not" before "less than ten strokes of whipping".

[8] The prosecution pointed out that the Sessions Court had informed the respondent that the sentence liable to be imposed on him was not less than ten strokes of whipping in addition to the prison sentence before passing the sentence. The respondent had acknowledged this.

The High Court's Decision

[9] In refusing to revise the sentence and dismissing the appeal, the High Court held that the fairest outcome is to maintain the sentence meted out by the Sessions Court, as the respondent had already pleaded guilty to the amended charge when it was read to him. The High Court also highlighted that the prosecution did not protest after the Sessions Court had passed the sentence following the erroneous amended charge. The High Court acknowledged that the Sessions Court should have imposed not less than ten strokes of whipping. However, it held that although the correct sentence had been explained to the respondent by the court before sentencing, it was only done after the critical process, namely where the respondent had pleaded guilty after the alleged erroneous amended charge was read to him. The Sessions Court's sentence was thus maintained, hence this appeal.

The Appeal

[10] The prosecution submitted that the High Court had erred in law by affirming the Sessions Court's sentence of four strokes of whipping, contrary to the provision of s. 39A(2) of the DDA 1952, which imposes not less than ten strokes of whipping. The prosecution highlighted the word "shall" preceding "whipping of not less than ten strokes", making it a mandatory provision.

[11] The prosecution also submitted that the respondent was not prejudiced as he had understood the nature and consequence of his guilty plea when the mandated sentence liable to be imposed on him was read and explained by the Sessions Court.

[12] Learned counsel for the respondent partly agreed with the prosecution and submitted that the High Court had erred in law by maintaining the whipping sentence passed by the Sessions Court, which was not in accordance with the law. The concession, however, ends there. Unlike the prosecution's stand that the whipping should be increased to not less than ten strokes, the respondent sought to be discharged and acquitted on the grounds that there had been a serious miscarriage of justice towards him.

[13] Learned counsel for the respondent argued that the amended charge read to the respondent was defective as it failed to fulfil the requirements of s. 152(4) of the Criminal Procedure Code ('CPC'). The section reads as follows:

> Form of charge
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> 152 ...
>
> (4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

[14] Learned counsel for the respondent argued that the sentencing provision in a charge is a legal requirement under s. 152(4) of the CPC. In furthering his argument, learned counsel contended that the amended charge read to the respondent was defective as the sentencing provision in the amended charge was erroneous in that it had stipulated "less than ten strokes" contrary to the mandatory requirement of "not less than ten strokes" under s. 39A(2) of the DDA 1952. Learned counsel also submitted that the respondent's plea to a defective charge could not be considered unequivocal and unqualified as he did not fully understand the charge framed against him and the consequences of pleading guilty to the alleged defective amended charge. Learned counsel also submitted that sub-s. 173(b) of the CPC imposes a duty on the court to ensure that the accused's guilty plea must be unequivocal and unconditional and that the Sessions Court had failed to adhere to the requirements set out under this provision. It was also highlighted that the High Court had, in its judgment, stated that it could not be certain of whether the respondent had pleaded guilty on the representation that the whipping would be less than ten strokes when the amended charge was read to him. In conclusion, learned counsel submitted that the respondent was deprived of the right to a fair hearing due to the Sessions Court's omission and the prosecution's mistakes and should, therefore, be acquitted and discharged.

Findings

[15] We will first address the issue of the amended charge, which the High Court viewed as defective. The provision on charges is contained in Chapter XVIII of the CPC, from ss. 152 to 172. The form of a charge is set out under s. 152 of the CPC, which states as follows:

Form of charge

152. (1) Every charge under this Code shall state the offence with which the accused is charged.

(2) If the law which creates the offence gives it any specific name the offence may be described in the charge by that name only.

(3) If the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

(6) If the accused has been previously convicted of any offence, and it is intended to prove that previous conviction for the purpose of increasing the punishment which the Court is competent to award, the fact, date and place of the previous conviction shall be stated in the charge. If the statement is omitted the Court may add it at any time before sentence is passed.

[16] Subsection 153(1) of the CPC requires the charge to contain the particulars of the time and place of the alleged offence and the person against whom the offence was allegedly committed as reasonably sufficient to give the accused notice of the matter he is charged with. Under s. 154 of the CPC, the charge should contain particulars of how the alleged offence was committed if the particulars mentioned under ss. 152 and 153 do not give the accused sufficient notice of the matter he is charged with. The format of a charge is provided in Form 27 of Second Schedule in the CPC.

[17] Prosecutors have made it a practice to set out the sentence applicable to the offence in the charge form, possibly for convenience. In this case, as in many cases, the prosecution has set out the punishment for the offence in the charge form. The sentence on the whipping was wrong, as no less than ten strokes of whipping are to be prescribed, whether the accused is eventually convicted or chose to plead guilty.

[18] The pertinent issue is whether it is required to state the sentence applicable for the offence in the charge. There is no requirement for the sentence concerning the offence to be stated in the charge under the CPC, nor is this set out in Form 27 in the CPC. It is, therefore, optional for the sentence of the offence to be stated in the charge form, for it does not form part of the charge. It is simply not required. A charge, therefore, could not be deemed defective if the particulars of the sentence were not set out or, if set out, is erroneous.

[19] The High Court had erred in law when it chose to uphold the sentence of four strokes of whipping meted out by the Sessions Court on the basis that it would be the fairest outcome, as it is mandatorily provided under sub-s. 39A(2) of the DDA 1952 that no less than ten strokes of whipping are to be prescribed. The sentencing provision set out in the charge does not override the Act.

[20] We have perused the relevant part of the notes of proceedings in the Sessions Court set out in the High Court's "grounds of decision". The respondent had pleaded guilty after the amended charge was read to him. The court interpreter explained the nature and consequences of pleading guilty to the amended charge to the respondent, who then stated that he understood them. The respondent was then asked whether he knew that he was liable to be imprisoned for life or a term of not less than five years and would also be punished with not less than ten strokes of whipping. The respondent answered positively.

[21] The Sessions Court had adhered to the requirements under s. 173 of the CPC as the court informed the respondent of the nature and consequence of pleading guilty, namely the sentence liable to be imposed on him. The Sessions Court, however, erred when it imposed only four strokes of whipping when at least ten strokes were to be imposed under sub-s. 39A(2) of the DDA 1952. The Sessions Court is bound by the sentencing provision in the DDA 1952 and not merely rely on the sentence set out in the amended charge. The fault equally lies with the prosecutor, who should have been more vigilant.

[22] The High Court, however, fell into error in deciding that the fairest outcome was to maintain the sentence of four strokes of whipping, as this was in contravention of the mandatory sentencing requirements under sub-s. 39A(2) of the DDA 1952, which requires no less than ten strokes of whipping. Since the High Court opined that the respondent had pleaded guilty to the alleged defective amended charge, which stated whipping of less than ten strokes, he should be given the benefit of doubt, more so when he was not represented in the Sessions Court. The High Court should have allowed the appeal and remitted the case to the Sessions Court for the respondent's plea to be retaken. This directive would have been the fairest outcome.

[23] We are therefore of the considered opinion that the conviction recorded against the respondent is unsafe and we set aside both the conviction and sentence. Consequently, as conceded by learned Deputy Public Prosecutor and agreed by learned counsel for the respondent, we make an order that this case be remitted back to the Sessions Court for a retrial.